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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899

No. 10.

CHARLES P. BULLARD ET AL., Petitioners,

vs.

CITY OF CISCO, TEXAS, Defendant.

REPLY BRIEF OF THE DEFENDANTS IN ERROR.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1932

No. 37471

CHARLES P. BULLARD, et al,
Petitioners

vs.

CITY OF CISCO, TEXAS,
Defendant

REPLY BRIEF OF THE DEFENDANTS-IN-ERROR

To the Supreme Court of the United States:

NATURE AND RESULT OF THE SUIT

The statement of the nature and result of the suit as made by plaintiffs-in-error is adopted by the defendants-in-error with the additional statement that the defendants raised the question of jurisdiction specifically as shown by Paragraphs No. 2 and 3 of their answer, as follows:

> "2nd. This Court is without jurisdiction to hear and to determine the cause of action sued

upon here, because plaintiffs are not the owners and holders of the bonds sued upon, or any of them. In this connection, defendants respectfully represent and show unto the Court that plaintiffs are not the owners of the bonds sued upon, or any of them; that they paid no valid consideration therefor, but that the bonds and coupons sued upon were delivered to, and are held by, the plaintiffs merely and solely for the purpose of collection, the plaintiffs having no beneficial interest therein whatever, and that the legal title and beneficial ownership is in others whose names are not disclosed and who are not parties plaintiff in this cause, all of which will appear and be made manifest by the contract or agreement by and under which plaintiffs hold said bonds and coupons, a copy of which is hereto attached, marked Exhibit "A," made a part hereof, and reference thereunto made for the tenor, terms, and effect thereof.

"3rd. These defendants further state that they are informed and believe, and being so informed and believing, allege the facts to be, that no one of the holders of bonds or interest coupons that are now due hold coupons or bonds in an amount sufficient to give this Court jurisdiction, or in the event that any one or more of the true owners and holders of said bonds and coupons that are now due, hold coupons or bonds in an

amount sufficient to give this Court jurisdiction, then numerous owners and holders of bonds do not have or hold an amount sufficient to give this Court jurisdiction of their claims. These defendants are not fully advised as to the names and residences of the holders and true owners of said bonds, or the amount of bonds and interest coupons held by by any or all of them, but state that the plaintiffs have full information with reference to the names and places of residence of the true holders of said bonds and the amount of bonds and interest coupons now due, held by each of the true owners, and in order that all parties may be fully protected in these matters, and in order that this Court may fully determine whether or not it has jurisdiction, these defendants pray that plaintiffs be required to answer under oath the names and residences of the true holders and owners of said bonds, who have delivered said bonds to plaintiffs for collection, pursuant to the trust agreement as shown by copy attached hereto, and the amount of the bonds and coupons past due now held by each." (Tr. p. 17-18)

FIRST COUNTER PROPOSITION TO ALL POINTS OF PLAINTIFFS-IN-ERROR

A party who has no legal title to municipal bonds cannot maintain an action thereon in the Federal Courts of the United States.

SECOND COUNTER PROPOSITION TO PLAINTIFFS-IN ERROR FIVE POINTS

Where two or more plaintiffs have separate and distinct demands, it is essential that the demand of each be of the requisite jurisdiction or amount.

THIRD COUNTER PROPOSITION

The question as to jurisdiction is deemed to be an issue where the defendants aver in their answer that they have no knowledge or information as to such citizenship and would leave plaintiff to proof thereof, which form of denial under the State practice raises the issue.

FOURTH COUNTER PROPOSITION

The objection that a Federal District Court was without jurisdiction to entertain a suit may be taken by answer

STATEMENT UNDER FIRST COUNTER PROPOSITION

The deposit agreement introduced in evidence by agreement of parties (Tr. p. 75—copied Tr. p. 21-37) shows conclusively that the plaintiffs Bullard, et al, were not the legal or equitable owners and holders of the bonds sued on in this cause but were only acting as agents.

The plaintiff Charles P. Bullard testified by deposition (Tr. p. 76) that he had no knowledge as to the names of the persons, firms or corporations from whom the transferrors of the title to the bonds to plaintiff acquired said

bonds, the dates they acquired them, the amounts acquired, and the sums of money paid therefor, but that plaintiffs wrote letters to persons, firms, or corporations from whom they acquired title to the bonds described in plaintiffs' bill of complaint requesting that they sign a contract and deliver the title to the bonds they held to the plaintiffs.

To avoid repetition, we refer to the opinion of the Honorable James C. Wilson, Judge of the United States District Court for the Northern District of Texas (Tr. p. 84-96) for a clear and full analysis of the effect of this contract.

The plaintiffs-in-error have fully and carefully analyzed this contract and the entire transaction with a view of showing that the plaintiffs-in-error were the real owners of the bonds, but when the contract as a whole is analyzed, it is readily apparent that they did not own the bonds but were simply employees of the true owners, just as attorneys are employees.

In addition to the many reasons given by the trial court to show that the plaintiffs were not the owners of the bonds in such capacity as would give them the right to sue thereon in the Federal Court, we suggest that there be considered the question of litigation as between the petitioners and the true owners as to the title to the bonds. Consider for instance the situation where a suit might be instituted against one or more of the true owners and a writ of garnishment served on the Bondholders Commit-

tee. They would have to answer that they held these bonds for the true owners subject to such expenses, fees, etc., as might be incurred and contracted for by virtue of their employment. In other words, it is clear that the nominal plaintiffs in this cause were simply employees of the real owners and the entire record is silent as to the names of the true owners and the amount of indebtedness claimed by each.

Plaintiffs-in-error say that if it should be held that the bonds and coupons delivered under the agreement did not constitute a sale, then the agreement constituted a trust agreement between plaintiffs-in-error and depositing bondholders, whereby plaintiffs-in-error hold the legal title to the bonds and coupons under an express trust. This to us is a strikingly novel proposition. In all the text books and decisions on the question of express trusts which we have read, the settler creates the trust and names the trustee, defining the powers and the purpose of the trust, but here, according to the theory of plaintiff-in-error, they constituted themselves trustee of an express trust of property in which they had no right, title, or interest, and invited the cestui que trust to become parties. This contention is not supported by the agreement for by its terms and provisions plaintiffs-in-error are nothing more than collecting agents with the right to retain compensation for services rendered and expenses incurred out of the proceeds of bonds and coupons that may be collected.

If plaintiffs-in-error are the legal owners of the bonds and coupons sued upon, why the necessity of excluding

nonparticipating bondholders from sharing in the rights thereunder? Why provide that registered holders of certificates issued to depositors by the committee should be deemed for all purposes to be the absolute owners of the bonds and coupons described therein? Why authorize the committee to collect and receive all moneys due and payable on the bonds? Why provide that the depositors of the bonds and coupons should not be personally liable for compensation to the committee or for expenses incurred by it? Why provide for compensation for services of the Committee? Why give the bondholders the right to dissent from any new plans proposed by the committee and the right to withdraw their bonds and coupons? Why give the committee the right to increase the number of members thereof? Why give the committee and others the right to become interested in any property which may become subject to the Committee? Why give to the committee the right to borrow and to hypothecate the bonds and coupons as collateral security for the payment of the loans? The only answer is that the title to the bonds never passed out of the owners, and that the committee acquired no title thereto. In other words, the agreement meant what it said—that owners of certificates issued by the committee "Shall be deemed for all purposes to be the absolute owners thereof and the bonds and coupons therein referred to."

That a party who has no legal title to municipal bonds cannot maintain an action thereon in the Federal Courts is well and finally settled by the decisions of the U. S. Su-

preme Court. (Williams vs. Notawa Twp. 102 U. S. 209, 26 L. Ed. 719 Woodside vs. Beckham, 216 U. S. 112, 54 L. Ed. 408; New Providence Twp. vs. Halsley, 117 U. S. 336, 29 L. Ed. 114; Lake County v. Dudley, 192 U.S. 243, 43 L. Ed 684; Jones vs. Lee, 18 How 76, 15 L. Ed. 263; House vs. Mullins, 22 Wall 42, 22 L. Ed. 838; Barnards Twp. vs. Stebbins, 109 U. S. 341, 27 L. Ed. 956; Pinnell vs. Pinnell, 240 U. S. 594, 60 L. Ed. 817.)

Section 80 of Title 28, U. S. C. A. (Judicial Code, Section 37) provides as follows:

"If any suit commenced in a district court or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require and shall make such order as to costs as shall be just. (Mar. 3, 1875, c. 137, Sec. 5, 18 Stat. 472; Mar. 3, 1887, c. 373, Sec. 6, 24 Stat. 555;

Aug. 13, 1888, c. 866, Sec. 6, 25 Stat. 436; Mar. 3, 1911, c. 231, Sec. 37, 36 Stat. 1098.)

It is to be noted that the Act provides that if at any time the court finds that "such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court . . . . the said district court shall proceed no further therein, but shall dismiss the suit," and therefore covers any case where it is deemed that the actual parties in interest do not have a case properly within the jurisdiction of the court, as well as where the "parties to said suit have been improperly or collusively made or joined."

The above provision of the Judicial Code came under consideration in the Supreme Court for the first time in a case involving bearer bonds of a municipal corporation. (Williams vs. Nottawa, 104 U. S. 209.) The facts in the case are stated by Chief Justice Waite, as follows:

> "This suit was brought by Williams, a citizen of Indiana, against the township of Nottawa, a municipal corporation of Michigan, to recover the amount alleged to be due on certain of its bonds, negotiable by the law merchant, and payable to Samuel Kline, or bearer. A trial was had by a jury, which resulted in a verdict, by the direction of the court, in favor of Williams for six of the bonds, and in favor of the township for the remainder. This writ of error has been brought by

Williams to reverse the judgment against him; and, as the court directed the verdict which was rendered, the whole of the evidence has been embodied in the bill of exception, and is properly before us for consideration.

"From the testimony of Williams himself, it distinctly appears he was personally the owner of only three of the bonds sued on of $100.00 each. One Bracey Tobey was the owner of three others of the same amount. The judgment in favor of Williams was upon these six bonds, and for $994.57 only. All the other bonds being those on which the judgment was rendered in favor of the township, were owned by Samuel Kline and William Conner, both of whom were residents of the township and citizens of Michigan when the bonds were issued. There is no evidence of any change of citizenship of Kline since the bonds were delivered, and Conner, who was a witness at the trial, testified that he continued to be a citizen of Michigan. The bonds were transferred by Kline and Connor to Williams simply for the purpose of collection with his own. The same is true of those belonging to Tobey, but there is nothing in the evidence to show of what State he was a citizen, though he testified that he bought his bonds in Michigan."

After stating the facts as above, the court cited and quoted the above section of the Judicial Code, and said:

"This case, so far as the bonds owned by Kline and Connor are concerned, comes clearly within this prohibition. As the actual owners of the bonds were citizens of Michigan, they could not sue in the courts of the United States, and Williams distinctly testified that he received and held their bonds solely for the purpose of collection with his own, and for their account. It cannot for a moment be doubted that this was done for the "purpose of creating a case" for Kline and Connor cognizable in the courts of the United States. That being so, it was the duty of the Circuit Court to dismiss the suit as to these bonds and proceed no further; for as to them the controversy was clearly between citizens of the same state, Kline and Connor being the real plaintiffs. The transfer to Williams was colored only, and never intended to change the ownership. This both Williams and Kline and Connor knew."

The court held that the issue of improper parties involving the question of jurisdiction could be raised by the appellees for the first time on appeal in the Supreme Court and that it was the duty of the court to dismiss the case in accordance with the command of the statute.

In the case of Bernards Township vs. Stebbins, 109 U. S. 341, the Supreme Court held that the provisions of the statute and the doctrine of the above case applied to suits in equity as well as in law. In that case the plaintiff had

brought together a large number of bonds, some of which were owned by the citizens of the State in which the suit was brought for the purpose of forcing the Township to place its corporate seal upon them. The plaintiff sued in equity to require the officials to attach the seal. The court decided that the owners of the bonds were entitled to have the seal attached, and that the court of equity would restrain the setting up of the wrongful failure to attach the seal in an action at law. The defendants challenged the right of the plaintiff to maintain the suit. The question was stated by the court as follows:

> "The remaining question argued at the bar is how far the citizenship of the real parties in interest, and the amount of the claims of each, should affect the exercise of jurisdiction and the extent of the decree.
>
> "The position of the plaintiff is, that the bonds and coupons being payable to bearer, they are entitled to sue, at law or in equity, on all the coupons held by them; that the combination of the holders of several claims of moderate amount against the same defendant, for the purpose of diminishing and sharing the expense of litigation, was entirely proper, and should be encouraged by the court; that the bonds and coupons owned as well as held by plaintiffs, and by others not citizens of New Jersey, clearly brought the case within the jurisdiction of the court; and

that to deny to citizens of New Jersey the right to transfer their claims to the plaintiffs for the purpose of collection in the same suit would be to discriminate unjustly between th ecitizens of New Jersey and the citizens of other states."

The question so stated was disposed of by the court in the following language:

"The decision in Williams vs. Nottawa establishes that the Circuit Court of the United States cannot, since the act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued there in their own names, either by reason of their being citizens of the same State as the defendant, or by reason of the insufficient value of their claims. The principle of that decision is equally applicable to suits in equity to assert equitable rights under such bonds."

In the case of Farmington vs. Pillsbury, 114 U. S. 138, the Supreme Court, in deciding a suit by a nonresident standing in substantially the same position as the Bondholders Committee in the case under consideration, held that he was not a proper party and that the suit instituted by him should be dismissed. The Court said:

"We are already of the opinion that this case falls within the prohibitions of the statutes. The bonds to which the coupons now in suit were attached were all bought as early at 1871 or 1872 by citizens of the State of Maine, who held and owned the bonds themselves when this suit was brought. Their purchases were made while a suit was pending in the courts of the State to test the validity of the bonds. On the 27th of August, 1878, the highest court of the State decided in effect that the bonds were inoperative and void, for want of constitutional power in the village corporation to issue them. Almost two years after this decision these coupons, to the amount of $7,922 were collected from various holders of bonds, all residents of the village of Farmington and citizens of Maine, and transferred, separate from the bonds, to the present plaintiff, a citizen of Massachusetts, under an arrangement by which the plaintiff gave the agent of the holders of the coupons his non-negotiable promissory note for $500, payable in two years from date, with interest and agreed, 'as a further consideration for said coupons', that if he succeeded in collecting the full amount thereof he would pay the agent, as soon as the money was got from the corporation, fifty per cent of the net amount collected above the $500. This suit, begun July 1, 1880, in the name of the plaintiff, is the result of that arrangement. It is a suit for the benefit of the owners of

the bonds. They are to receive from the plaintiff one-half of the net proceeds of the case they have created by their transfer of the coupons gathered together for that purpose.

"The suit is their own in reality, though they have agreed that the plaintiff may retain one-half of what he collects for the use of his name and his trouble in collecting. If is true the transaction is called a purchase in the papers that were executed and that the plaintiff gave his note for $500 but the time for payment was put off two years, when it way no doubt, supposed the result of the suit would be known. No money was paid, and as the note was not negotiable, it is clear the parties intended to keep the control of the whole matter in their own hands, so that if the plaintiff failed to recover the money he could be released from his promise to pay."

In the case of Lake County Commissioners .vs. Dudley, 173 U. S. 243, the Supreme Court, after setting forth the testimony of the plaintiff in the case, in which he testified that the bearer bonds and coupons of the county were transferred to him for the purpose of collection and for the purpose of bringing suit upon them, decided the case in the following language:

"From the evidence in this cause of Dudley himself, it is certain that he does not in fact own

any of the coupons sued on and that his name, with his consent, is used in order that the Circuit Court of the United States may acquire jurisdiction to render judgment for the amount of all the coupons in suit, a large part of which are really owned by citizens of Colorado, who, as between themselves and the Board of Commissioners of Lake County, could not invoke the jurisdiction of the Federal Court, but must have sued, if they sued at all, in one of the courts of Colorado. It is true that some of the coupons in suit are owned by corporations of New Hampshire who could have themselves sued in the Circuit Court of the United States. But if part of the coupons in question could not by reason of the citizenship of the owners have been sued on in that court, except by uniting the causes of action arising thereon with causes of action upon coupons owned by persons or corporations who might have sued in the Circuit Court of the United States, and if all of the causes of action were thus united for the collusive purpose of making 'a case' cognizable by the Federal Court as to every issue made in it, then the act of 1875, must be held to apply, and the trial court on its own motion should have dismissed the case without considering the merits.

"In Williams vs. Nottawa, 104 U. S. 209, 211, this court said that Congress when it passed the act of 1875 extending the jurisdiction of the courts

of the United States was especially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as the parties against frauds upon its jurisdiction."

The decisions of the Supreme Court clearly announce that a case should be dismissed upon it appearing that jurisdiction is defective, either on account of diversity of citizenship being absent, or, on account of the claims of the true parties in interest not being sufficient as to jurisdictional amount, that is, over $3,000.00.

In the case of Waite vs. Santa Cruz, 184 U. S. 302, the Supreme Court made an analysis of various statutory provisions relating to suits upon assigned claims, and held that the assignment of bearer bonds and coupons attached thereto by a non-resident of the State in which the defendant City was located to the plaintiff, so that the aggregate amount came within the jurisdiction of the court, did not confer jurisdiction unless the claim of each non-resident was sufficient to bring the case within the jurisdiction of the court. On this question the court said:

"Does the record show that the Circuit Court was without jurisdiction of some of the causes of

action embraced by the compaint? We say 'record' because this court will not reverse a judgment for want of jurisdiction in the Circuit Court, if its jurisdiction sufficiently appears either from the pleadings or from the record. Railway Company vs. Ramsey, 22 Wall, 322; Bridges vs. Sperry, 95 U. S. 401; Robertson vs. Cease, 97 U. S. 646, 648. The complaint here shows diverse citizenship, as between the plaintiff and the defendant city, but the record reveals the fact that the plaintiff included in his suit a large number of claims owned by the citizens of States other than California, but which, by reason of their small amount, could not have been sued on separately in the Circuit Court by the persons or corporations, the real owners, who put them in plaintiff's hands for collection.

"Of course there can be no doubt. The entire issue of refunding bonds was 360, of $1,000.00 each, numbered from one to three hundred and sixty. They were of the character known as 'serials', each series consisting of nine bonds. The first series included the bonds numbered from one to nine, both inclusive, and each succeeding series included the nine bonds numbered consecutively after those embraced in the next preceding series. The bonds of the first series fell due April 15, 1895, and were the only bonds that had become due when the present action was brought.

The remaining series were made payable in consecutive order on the 15th of April in each succeeding calendar year thereafter until and including the year 1934. Now, this suit is for the amount due on nine of the forty bonds of $1,000 each, constituting the first series, and falling due April 15, 1895, and two hundred and eighty-two coupons of $50 each, all of which coupons, above the coupon of Bond No. 40 of the first series, were attached to the bonds that were not yet due. No owner of a $50 coupon attached to a bond not due could have sued upon it in the Circuit Court. Each coupon of that amount was a complete instrument, capable of supporting a separate action, in the proper forum, without reference to the maturity or ownership of the bonds to which they were attached. Koshkonong vs. Burton, 104 U. S. 668, and authorities there cited; Elgin vs. Marshall, 106 U. S. 578. No owner of coupons, aggregating less than $2,000, could have sued in the Circuit Court by reason of the bonds to which they were attached, (but which were not due), exceeding the jurisdictional amount. But when the several owners of $50.00 coupons which were due, put them all in the hands of the plaintiff for collection, the amount appeared to be sufficient for purposes of jurisdiction. Thus a case was made by which the Circuit Court was led to take cognizance of certain claims too small for its jurisdiction if they had been severally sued on

by the real owners, although there was jurisdiction as to the parties who owned eight of the nine bonds in suit. It also appears that one of the transferrers of the plaintiff owned only one bond of $1,000. The value of the matter in dispute, as to him, was only the amount of that one bond and one coupon of $50.

"We adjudge that, as the plaintiff does not own the bonds or coupons in suit, but holds them for collection only, the Circuit Court was without jurisdiction to render judgment upon any claim or claims, whether bonds or coupons, held by a single person, firm, or corporation against the city, and which, considered apart from the claim or claims of other owners, could not have been sued on by the real owner by reason of the insufficiency of the amount of such claim or claims."

The jurisdiction of the Federal Court must affirmatively appear on the face of the record, and unless jurisdiction does so appear, the court must dismiss the case. (Continental Life Ins. Co. vs. Rhoads, 119 U. S. 237, 30 L. Ed. 380; Kinney vs. Columbia Savings & Loan Ass'n., 191 U. S. 78, 48 L. Ed. 103; Fishback vs. W. U. Te. Co. 161, U. S. 96, 40 L. Ed. 103; Johnson vs. Christian, 125 U. S. 642, 31 L. Ed. 820; Thomas vs. Board of Trustees, 195 U. S. 207, 49 L. Ed. 160.)

STATEMENT, ARGUMENT, AND AUTHORITIES UNDER SECOND COUNTER PROPOSITION

The plaintiffs allege in their petition: "Plaintiffs are the owners of and hold title to various and sundry of said bonds and interest coupons thereon, including the following." (Tr. p. 8.) The defendants challenged this ownership and plead that: "No one of the holders of bonds or interest coupons that are now due hold coupons or bonds in an amount sufficient to give this court jurisdiction, or in the event that any one or more of the true owners and holders of said bonds and coupons that are now due hold coupons or bonds in an amount sufficient to give this court jurisdiction, then numerous owners and holders of bonds do not have or hold bonds in an amount sufficient to give this court jurisdiction of their claims. (Defendants' Answer, Tr. p. 17-18. This answer was verified.)

The Supreme Court of the United States has repeatedly held in effect that when two or more plaintiffs have separate and distinct demands united for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount, but where several plaintiffs united to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.

AUTHORITIES

Fishback vs. W. U. Tel. Co. 161 U. S. 96, 16 Sup. Ct. Rep. 506; 40 L. Ed. 630.

Citizens Bank vs. Cannon, 164 U. S. 319; 17 Sup. Ct. Rep. 89; 41 L. Ed. 451.

Wheless vs. St. Louis, 180 U. S. 379, 21 Sup. Ct. Rep. 402; 45 L. Ed. 583.

Troy Bank vs. G. A. Whitehead & Co. 222 U. S. 39; 32 Sup. Ct. Rep. 9; 56 L. Ed. 81.

Pinnel vs. Pinnel, 240 U. S. 594; 36 Sup Ct. Rep. 416; 60 L. Ed. 817.

Walter vs. Northeastern Railway Co. 147 U. S. 370; 13 Sup. Ct. Rep. 348; 37 L. Ed. 206.

Scott vs. Fowler, 253 U. S. 243; 40 Sup. Ct. Rep. 503; 64 L. Ed. 883.

It should be borne in mind that as the plaintiffs had alleged that they were the owners of the bonds without any qualifying statement, then the character of their rights could not be raised by a demurrer or motion to dismiss. This ownership was denied under oath and it was particularly plead in the verified answer that the true owners, or many of them, did not hold matured bonds or coupons in an amount sufficient to confer jurisdiction on the Federal Court.

STATEMENT, ARGUMENT, AND AUTHORITIES UNDER THIRD COUNTER PROPOSITION

When there is a special denial under oath of any particular matter or fact, the plaintiff is charged with the burden of proving all essential facts, including facts showing jurisdiction, particularly in a court of limited jurisdiction.

AUTHORITIES

Gilbert vs. David, 235 U. S. 561, 59 L. Ed. 361.

Continental Life Ins. Co. vs. Rhoads, 119 U. S. 237; 30 L. Ed. 380.

Kinney vs. Columbia Savings & Loan Ass'n. 191 U. S. 78; 48 L. Ed. 103; Fishback vs. W. U. Tel. Co. 161 U. S. 96; 40 L. Ed. 630.

Johnson vs. Christian, 125 U. S. 642, 31 L. Ed. 820.

Thomas vs. Board of Trustees, 195 U. S. 207; 49 L. Ed. 160.

STATEMENT, ARGUMENT, AND AUTHORITIES UNDER FOURTH COUNTER PROPOSITION

Plaintiffs having alleged absolute ownership of all of the bonds in controversy without any qualification, and the defendants being unable to raise this question by demurrer or exception, defendants properly raised the question by verified answer, particularly denying the owner-

ship of bonds and alleging that the true owners did not have bonds in an amount sufficient to confer jurisdiction as to their particular claims, and praying that plaintiffs be required to answer under oath the names of the true owners of the bonds and the amount held by each.

The trust indenture introduced in evidence by agreement showed that the plaintiffs in this cause were only collecting agents, the true owners of the bonds being unknown

Certainly it would have been easy for the plaintiffs to have stated the names of the true owners of the bonds, or their principals, and to have given the amount held by each. The fact that plaintiffs-in-error proved that only four of the owners of the bonds aggregating $3,000.00 each certainly would have been sufficient to justify the Trial Court in affirmatively holding that no other owners of the bonds held bonds or coupons in excess of $3,000.00.

As is stated by the Citcuit Court of Appeals, there was no evidence tending to prove that any of such owners, except four, owned past due bonds or coupons sufficient in amount to give the court jurisdiction of a suit thereon, and that the record failed to show that the past due bonds or coupons owned by any owners except four were sufficient in amount to enable the real owners to sue thereon.

As is shown by the opinion of the trial court, upon the presentation of the pleadings, since there was an allegation of ownership the court retained jurisdiction to hear

the evidence but at the conclusion of the evidence, and when the plaintiffs had wholly failed to show the true owners of the bonds and the amount thereof, although they were requested to do so by the pleadings on file, then plaintiffs had wholly failed to discharge the burden placed on them and the court had the right to conclude as an affirmative matter that the owners, other than the four named by plaintiffs, did not have bonds in amounts sufficient to confer jurisdiction on the Federal Court.

AUTHORITIES

North Pacific Steamship Co. vs. Soley, 257 U. S. 215; 66 L. Ed. 203.

Riggs vs. Traders Co. 145 Fed. 254.

Penn Co. vs. Bay, 138 Fed. 203.

Plaintiffs-in-error ably and plausibly contend that since it is not shown that the transfer to the plaintiffs-in-error was not in good faith or for the sole purpose of conferring jurisdiction, that the Federal Court should have retained jurisdiction. They lose sight of the main issue which is not the cause or purpose of the transfer but is the result or effect thereof.

In all of the cases cited by plaintiffs-in-error there was a transfer where the title actually passed to, and became vested in, plaintiffs. In this case there was no actual transfer or a passing of title but only the granting of an agency.

The mere fact of delivery would not estop the defendants from showing, as was done in this case, the true purpose of the transfer or the ultimate effect thereof.

As was stated by the learned trial court, the instrument as a whole was considered, and when it was considered as a whole, it shows in fact no actual transfer so as to enable plaintiffs-in-error to maintain a suit in the Federal Court.

DEFENDANTS'-IN-ERROR INDEPENDENT COUNTER PROPOSITION

The District Court dismissed the case as a whole, giving as reason therefor that although four bondholders' holdings each exceeded $3,000.00, under the state of record all must be dismissed because the claims of the parties are not separated or segregated in the evidence in any way and could not be identified, and in view of the whole situation it was his opinion that the case in its entirety should be dismissed. (Tr. p. 96.)

The Circuit Court of Appeals reversed the judgment of the trial court on the ground that before dismissing the suit in so far as the claims based on the bonds and coupons held by the four bondholders owning bonds and coupons in excess of $3,000.00, the Court's discretion would have been properly exercised by affording a further opportunity to make clear proof of claims asserted by the suit and already shown to be within the court's jurisdiction. (Tr. p. 103-104.)

We respectfully submit that the trial court was correct and the Circuit Court of Appeals in error in this for the reason that plaintiffs-in-error had had ample opportunity to make this proof and did not do so. There was no evidence introduced which would show the amount that these four bondholders should recover, and even after the trial court had rendered its opinion, the record is silent as to any effort on the part of plaintiffs-in-error to offer this proof.

As is stated in the case of Eliza S. House vs. Andrew Mullin, 89 U. S. 43, 22 L. Ed. 839, where a demurrer was sustained and counsel did not amend, the bill was properly dismissed as the presumption must be that no leave to amend was asked.

The defendants had alleged that all, and if not all, then many of the bond owners did not have bonds or coupons in an amount sufficient to confer jurisdiction, and the plaintiffs-in-error at no time prior to or during the trial particularly plead the amount owned by each, or did they offer to prove the amount owned by each one of the four whom they contended held bonds in excess of $3,000.

We therefore respectfully submit that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the trial court be affirmed, or that the judgment of the Circuit Court of Appeals should be affirmed.

BUTTS & WRIGHT

By _____
Of Counsel
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